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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

Claude Earl Flaherty and
Gene Whipple ..... *Petitioners*

V.

State of Arkansas ..... *Respondent*

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE UNITED STATES

BRIEF FOR RESPONDENT IN OPPOSITION

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INDEX

Page

OPINION BELOW 1

JURISDICTION 1

QUESTION PRESENTED 2

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT 2

ARGUMENT:

PETITIONERS' CONSTITUTIONAL RIGHTS WERE NOT VIOLATED. THE DECISION BELOW DOES NOT CONFLICT WITH ANY FEDERAL STATUTE OR DECISION 3

CONCLUSION 7

CASES CITED

Coolidge v. New Hampshire, 403 U.S. 443, 29 L. Ed. 2d 564, 91 S. Ct. 2022 5

Lee v. Florida, 392 U.S. 378, 20 L. Ed. 2d 1166, 88 S. Ct. 2096 4

Liberto v. State, 248 Ark. 350, 451 S.W.2d 454 3

Lopez v. United States, 373 U.S. 427, 10 L. Ed. 2d 462, 83 S. Ct. 1381 4

Rathbun v. United States, 355 U.S. 107, 2 L. Ed. 2d 134, 78 S. Ct. 161 3

Stanley v. Georgia, 394 U.S. 557, 22 L. Ed. 2d 542, 89 S. Ct. 1243 5

United States v. Pasha, 332 F. 2d 193 (7th Cir. 1964) 4

STATUTES CITED

Title 47 U.S.C. §605 3

Title 18 U.S.C. §2510, et. seq 4

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OPINION BELOW

The opinion of the Arkansas Supreme Court is reported at 500 S.W.2d 87 and is reproduced at page 14 of the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether the Constitutional rights of Petitioners were violated by policemen who answered petitioner Flaherty's telephone and recorded incoming calls or by the subsequent introduction of said recordings into evidence in a State Court prosecution for Operation of a Gambling House.

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional Provisions involved are the Fourth Amendment, the Sixth Amendment "confrontation" clause, and the Due Process clause of the Fourteenth Amendment of the United States Constitution.

STATEMENT

Petitioners were convicted of Operating a Gambling House under Arkansas Statutes Annotated §41-2001.

Petitioner Flaherty owned a house in Fort Smith, Arkansas. After a three week investigation, the police obtained a search warrant and entered the Flaherty home on November 11, 1972. Both petitioners were placed under arrest and a search of the building produced numerous parlay cards, betting slips, racing forms, and football schedule sheets.

For approximately an hour a police officer answered the Flaherty telephone and recorded the incoming calls which consisted of conversations of persons wishing to place bets on horse races and football games. These recordings were placed in evidence at trial over defense objections.

ARGUMENT

Petitioners' constitutional rights were not violated. The decision below does not conflict with any federal statute or decision.

Petitioners first suggested that the callers whose voices were recorded were " . . . used as witnesses against these Petitioners . . . " and that petitioners' Sixth Amendment rights of confrontation were thereby denied.

The conversations were recorded by an officer who placed a suction device on the receiver of Flaherty's telephone. The officer then impersonated one or the other of the petitioners and pretended to receive and record wagers.

The Arkansas Supreme Court dealt with this exact issue and concluded that the recordings were introduced for the purpose of proving that the statements were made and that the officer could have testified as to the conversations he heard. Clearly the officer was the witness against petitioners and not the people who called. The officer was, of course, subject to cross-examination and the recordings were merely physical evidence supporting his testimony, namely that when he answered the telephone the callers attempted to place bets. *Liberto v. State*, 248 Ark. 350, 451 S.W.2d 464.

The cited case of *Rathbun v. United States*, 355 U.S. 107, 2 L. Ed. 2d 134, 78 S. Ct. 161, wherein the *defendant's* voice was overheard by officers when he threatened the life of one Sparks, is inapplicable to the present case except insofar as it held that the actions of the police did not amount to an "interception" under 47 U.S.C. §605.

Petitioners urge that the conversations were "intercepted" and recorded in violation of 18 U.S.C. §2511 and that the Arkansas Supreme Court's holding to the contrary disregards *Lee v. Florida*, 392 U.S. 378, 20 L. Ed. 2d 1166, 88 S. Ct. 2096.

The *Lee* case involved a situation where officers had a telephone connected to Lee's line without his knowledge and recorded conversations thereby.

> "What was done here was a far cry from the police activity in *Rathbun v. United States* (citation omitted), a case heavily relied upon by the respondent. There we found no interception where 'a communication [is] overheard on a regularly used telephone extension' . . . In the present case, by contrast, there was neither 'the consent of one party' nor a 'regularly used' telephone . . . " (392 U.S. at 381)

The *Lee* case is inapplicable to the case at bar. The Flaherty telephone was already installed and the officers merely answered it when it rang. No calls were "intercepted" within the meaning of 47 U.S.C. §605 or 18 U.S.C. §2510, et. seq. See *United States v. Pasha*, 332 F. 2d 193 (7th Cir. 1964).

It should be noted that the equipment used by the police in the present case, namely a small tape recorder and a "pickup" to be affixed to the telephone receiver, did not enable the police to listen to conversations that could not have been heard otherwise. The equipment merely allowed the police to obtain the most reliable evidence of the conversations possible. See *Lopez v. United States*, 373 U.S. 427, 10 L. Ed. 2d 462, 83 S. Ct. 1381.

Finally it is submitted by respondent and conceded by petitioners that the police officer was a *party* to the conversations within the meaning of 18 U.S.C. §2511(d).

Petitioners argue that the recordation of the telephone conversations was illegal since not provided for in the search warrant. While this exact argument was not presented to the Arkansas Supreme Court, respondent nevertheless replies that it is without merit.

First, the act of the officers in answering the telephone and recording the conversations was not a "seizure". The warrant provided for the seizure of the material (parlay cards, betting slips, racing forms, etc.) actually seized. There was no requirement that the warrant state the intention of the police to answer the telephone.

Secondly, it should be noted that petitioners concede that the police were *invited* to enter the Flaherty home.

Finally, it is argued that the purpose of the search warrant is to describe the things to be seized and the persons or place to be searched. The warrant in the instant case fulfilled that purpose and the act of the police in answering the telephone had nothing to do with the warrant. The cases of *Coolidge v. New Hampshire*, 403 U.S. 443, 29 L. Ed. 2d 564, 91 S. Ct. 2022, where an automobile was searched without a warrant, and *Stanley v. Georgia*, 394 U.S. 557, 22 L. Ed. 2d 542, 89 S. Ct. 1243, where officers discovered pornographic material in the course of a search for evidence of illegal bookmaking, are not even remotely applicable to the case at bar.

On the basis of the foregoing, respondent argues that the decision below correctly interpreted the applicable

federal statutes and case law. Further, none of the petitioners' constitutional rights were at any time violated. Therefore, no basis has been presented for the granting of certiorari.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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